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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 236

UNITED STATES EX REL. WALTER GUTTERSON, PETITIONER

v.

E. E. THOMPSON, WARDEN OF THE UNITED STATES HOUSE OF DETENTION AT 427 WEST STREET, NEW YORK CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 24) is not yet reported. The opinion of the district court (R. 10–18) is reported at 47 F. Supp. 150.

JURISDICTION

The judgment of the circuit court of appeals was entered June 2, 1943 (R. 25). The petition for a writ of certiorari was filed August 6, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Board of Parole has power, subsequent to the time when the term of a parolee's sentence would otherwise have expired, to execute a retaking warrant issued during the term upon reasonable cause to believe that he had violated his parole in that he had been charged with the commission of a state offense, when in the interim the state charge remained pending against him and he had been in technical custody under that charge.

STATUTE INVOLVED

Sections 4 and 6 of the Parole Act of June 25, 1910, 36 Stat. 820, as amended, 18 U. S. C. 717, 719, provide:

> SEC. 4. If the warden of the prison or penitentiary from which the prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner.[1]
>
> SEC. 6. When a prisoner has been retaken upon a warrant issued by the Board

[1] Section 3 of the Act of May 13, 1930, 46 Stat. 272, 18 U. S. C. 723c, vested exclusive authority to issue retaking warrants in the Board of Parole.

of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced.

STATEMENT [2]

On June 29, 1938, petitioner was convicted of using the mails in the execution of a scheme to defraud and was sentenced to three years' imprisonment.[3] He began service of his sentence on

[2] The record on appeal consists merely of the petition for a writ of habeas corpus, the writ itself, the return thereto, petitioner's traverse to the return, the opinion of the district court, and its order dismissing the writ. The record contains no findings of fact and the case was apparently disposed of below on the theory that the essential facts were not in dispute and that there was presented for decision only a question of law. This statement is therefore predicated primarily upon the facts recited in the pleadings and the opinion of the district court, but we have supplemented the record facts with certain explanatory matter appearing in the files of the Board of Parole as to which the record here is silent.

[3] Petitioner states in his petition for a writ of certiorari (p. 2) that as part of his sentence he was also placed on probation for two years, to commence at the expiration of his imprisonment sentence.

July 23, 1938, and the full term was scheduled to expire on July 20, 1941. On November 10, 1940, he was released on parole. (R. 3, 10.)[4] While so on parole, petitioner was arrested and admitted to bail upon a New York State charge of grand larceny. Thereafter, on July 18, 1941, two days prior to the scheduled expiration of the full term of petitioner's sentence, the Board of Parole issued a retaking warrant for his arrest, charging him with violation of his parole in committing the act which was the basis of the State charge. Petitioner remained on bail on the State charge until September 18, 1941, when it was dismissed. (R. 6–7, 16.) On the same date petitioner was arraigned on a State misdemeanor charge arising out of the same transaction. Pending disposition of the latter charge he was released by the State court in the custody of his counsel. (R. 7, 16.) On June 15, 1942, while so in custody and prior to trial on the misdemeanor charge, petitioner was arrested pursuant to the Parole Board's retaking warrant issued July 18, 1941, and was placed in the custody of respondent, who is the Warden of Federal Detention Headquarters at 427 West St., Borough of Manhattan, New York City (R. 6, 7, 16), which is located in the Southern District of New York.

[4] The Parole Board's file discloses that petitioner was conditionally released on that date pursuant to the provisions relating to deductions for good conduct (18 U. S. C. 710, 713). Under 18 U. S. C. 716b a prisoner so released is treated as on parole until the expiration of the maximum term of his sentence.

Throughout the period from the date of his release on parole until he was arrested on the retaking warrant, petitioner regularly reported to the Parole Board in Brooklyn, New York (R. 3).

On July 30, 1942, petitioner's wife filed in the District Court for the Eastern District of New York a petition for a writ of habeas corpus alleging that the Parole Board had lost jurisdiction over petitioner because the term of his sentence had expired prior to the execution of the retaking warrant (R. 2–4). The writ issued (R. 5), and in response thereto respondent caused petitioner to be produced before the court and filed a return (R. 6–8), to which petitioner filed a traverse (R. 8–9).[5] The district court, on November 2, 1942,

[5] Since the place of petititoner's detention was in the Southern, not the Eastern, District of New York, it would seem clear that the writ of habeas corpus was subject to a motion to quash by respondent. *Jones* v. *Biddle*, 131 F. (2d) 853, 854 (C. C. A. 8), certiorari denied, 318 U. S. 784; *United States* v. *McNeil*, 69 F. (2d) 107, 108 (C. C. A. 3); *United States ex rel. Belardi* v. *Day*, 50 F. (2d) 816, 818 (C. C. A. 3); *Ex parte Yee Hick Ho*, 33 F. (2d) 360, 361 (N. D. Cal.); *Ex parte Gouyet*, 175 Fed. 230, 233 (D. Mont.); *In re Boles*, 48 Fed. 75, 76 (C. C. A. 8); *United States ex rel. Rubin* v. *Powell*, 1 F. R. D. 644 (S. D. N. Y.). Respondent, however, appeared generally and produced petitioner pursuant to the writ (R. 6–8). There is some authority for the proposition that in these circumstances the court acquires jurisdiction (see *Ex parte Fong Yim*, 134 Fed. 938, 939 (S. D. N. Y.); see also *Application of Gillard*, 105 Nebr. 84 (1920); *Ex parte Mayen*, 49 Cal. App. 531 (1920); *State ex rel. Shirley*, 20 Ala. App. 473 (1925); *Simmons* v. *Georgia Iron and Coal Co.*, 117 Ga. 305 (1903)), and we have found no authority to the contrary. In view of this, although the question is not free from doubt, we do not press it.

dismissed the writ and remanded petitioner to respondent's custody (R. 18–19), holding that since petitioner was in technical State custody from the time the retaking warrant was issued, the authority of the Parole Board continued beyond the time when the term of his sentence would have expired but for the issuance of the warrant (R. 10–18). Petitioner was released on bail pending appeal (R. 1–2, 21–22).[6]

On appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the district court was affirmed *per curiam* (R. 24, 25).[7]

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[6] Although not shown by the record, the Department files show that petitioner was also released on bail by the district court pending its disposition of the petition for a writ of habeas corpus. The Department files also show that on August 13, 1943, upon receipt of the mandate of the circuit court of appeals affirming the judgment of the district court, the latter court terminated petitioner's bail and ordered him surrendered to the custody of respondent. Since the Parole Board has revoked petitioner's parole (see note 7, *infra*), he must serve the remainder of his sentence (18 U. S. C. 719, *supra*, p. 3), which we estimate to be approximately six and one-half months, petitioner having been incarcerated pursuant to the retaking warrant for about six weeks prior to the filing of the petition for a writ of habeas corpus (*supra*, pp. 4–5).

[7] The record here does not disclose whether petitioner appeared before the Board of Parole after he was arrested on the retaking warrant or whether the Board revoked, terminated, or modified the terms or conditions of his parole, as contemplated by the statute (18 U. S. C. 719, *supra*, pp. 2–3). There is, however, no issue in the case in respect of any nonaction of the Board in this regard. In fact, as the Parole Board's file shows, the Board revoked petitioner's parole on August 3, 1942.

ARGUMENT

There is no merit in petitioner's contention (Pet. 8–14) that the Board of Parole was without authority to cause its retaking warrant to be executed after the lapse of a period of time equivalent to the term of his sentence. A violation of parole suspends the running of the parolee's sentence and, accordingly, the authority of the Board to retake him, upon its warrant seasonably issued in conformity with the terms of the statute,[8] may continue beyond the time when his sentence would have expired had he not violated his parole. *Zerbst* v. *Kidwell*, 304 U. S. 359, 361–363; *Anderson* v. *Corall*, 263 U. S. 193, 196; *Adams* v. *Hudspeth*, 121 F. (2d) 270, 272 (C. C. A. 10); *Hogan* v. *Zerbst*, 101 F. (2d) 634 (C. C. A. 5); *Platek* v. *Aderhold*, 73 F. (2d) 173 (C. C. A. 5).

Petitioner concedes (Pet. 12–13) that if a parolee is convicted and sentenced to imprisonment for another offense while on parole, his legal status is analogous to that of an escaped convict,[9] and that a retaking warrant seasonably issued during the term of his original sentence may be executed upon his release from imprisonment for the second crime, even though the time may have passed at which, had he not been paroled, service of the original sentence would have been completed. See cases cited, *supra*.

[8] 18 U. S. C. 717, *supra*, p. 2.

[9] See *Zerbst* v. *Kidwell*, 304 U. S., at 361.

Petitioner, however, claims that these cases, and the principles they enunciate, are inapplicable here, (1) because the Board of Parole had terminated his parole prior to the execution of the retaking warrant, and (2) because he was available for arrest at all times subsequent to the issuance of the warrant. Neither of these attempted bases of distinction is sound.

(1) The record basis for petitioner's assertion that the Board had terminated his parole is the allegation in his traverse to respondent's return to the writ of habeas corpus that, "Beginning with September 1941 and continuously until and including June 1942, the United States Board of Parole voluntarily abandoned the requirement that the Relator file a Parole Report and instead required that the Relator file a report of Probation, which the Relator did and the United States Board of Parole accepted" (R. 9). However, as appears from the petition for a writ of certiorari (p. 2), petitioner was, under the terms of his original sentence, to serve two years on probation to follow the imprisonment sentence. That sentence had been scheduled to expire on July 20, 1941. In September 1941 the New York State charge, which occasioned the issuance of the retaking warrant, was still pending against petitioner and because of that the Board had taken no action on its warrant (see note 11, p. 10, *infra*). In view of the contingency that the Board might ultimately have concluded that petitioner had not

violated his parole, it was appropriate that he should have been treated as a probationer, in accordance with the terms of his sentence, pending final disposition of the charge of parole violation.[10] Clearly this action did not divest the Board of its authority to proceed against petitioner as a parole violator.

(2) In respect of petitioner's contention (Pet. 13–14) that he was "available for arrest at any time" subsequent to the issuance of the retaking warrant, the record shows that he was at all times prior to the execution of the warrant in the technical custody of the State of New York on a charge which was the very basis of the Board's warrant. Certainly, the Board would have been entitled to await the final disposition of that charge, for the result would have been relevant in the Board's determination whether petitioner had violated his parole. Cf. *Hogan* v. *Zerbst*, 101 F. (2d) 634 (C. C. A. 5). But it is equally true that the Board was not required to postpone its determination until the disposition of the State charge, since, in any event, it would not have been bound by the judgment of the State court. See 18 U. S. C. 719; *Hogan* v. *Zerbst, supra,* at 634–635; cf. *Jianole* v. *United States,* 58 F. (2d) 115,

[10] Moreover, the Parole Board's file indicates that petitioner's parole reports were submitted to the Probation Officer for the Eastern District of New York, who was acting for the Board (cf. 18 U. S. C. 727), and that he continued after September 1941 to report as a probationer to the same officer.

117–118 (C. C. A. 8); *Campbell* v. *Bishop*, 47 F. (2d) 95, 97 (C. C. A. 5); *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4); *Riggs* v. *United States*, 14 F. (2d) 5, 12 (C. C. A. 4), certiorari denied, 273 U. S. 719. In the instant case the Board did wait for almost a year before executing its warrant and the State charge had not even then been finally determined.[11] Petitioner's contention, therefore, amounts to no more than a complaint that he has been harmed because the Board treated him less severely than it could have.

CONCLUSION

The case was correctly decided below and involves no real conflict of decisions[12] or important question of law. We therefore respectfully submit

[11] The Parole Board's file shows that trial of the State charge was repeatedly continued and we are advised that it was not until January 1943 that the State proceeding was terminated by a judgment of conviction. This judgment sentenced petitioner to a fine, which was paid, and also placed him on probation. It was affirmed on appeal on May 10, 1943. Furthermore, the Board's file indicates that petitioner himself requested the Board to withhold action on its warrant until he had had an opportunity to prove his innocence on the State charge.

[12] The cases relied upon by petitioner (Pet. 10–13) are not only readily distinguishable on their facts, but insofar as they contain language which appears to support his position that the Parole Board in the circumstances of this case was without power to execute its retaking warrant after the expiration of the term of the imprisonment sentence, they are inconsistent with the rationale of this Court's decisions in *Zerbst* v. *Kidwell*, 304 U. S. 359, and *Anderson* v. *Corall*, 263 U. S. 193.

that the petition for a writ of certiorari should be denied.

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